

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review	)	
of the Commission’s Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant	)	MB Docket 02-277
To Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	

**COMMENTS OF CAPITOL BROADCASTING COMPANY, INC.  
RE: THE EFFECT OF THE CONSOLIDATED APPROPRIATIONS ACT, 2004  
ON THE UHF DISCOUNT**

**CAPITOL BROADCASTING  
COMPANY, INC.**

Dianne Smith  
Special Projects Counsel  
Capitol Broadcasting Company, Inc.  
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March 19, 2004

## COMMENTS

In response to the Federal Communications Commission's Public Notice, DA 04-320, Capitol Broadcasting Company, Inc.<sup>1</sup> ("CBC") submits the following comments regarding the effect, if any, of the Consolidated Appropriations Act, 2004, H.R. 2673,<sup>2</sup> on the Commission's decision in the 2002 Biennial Regulatory Review *Report and Order*<sup>3</sup> to retain the UHF discount applicable to the national TV ownership limit<sup>4</sup> and on pending petitions for reconsideration asking the Commission to eliminate the UHF discount.

The Appropriations Act does not moot the current challenges to the UHF discount at the Commission or at the United States Court of Appeals for the Third Circuit ("Third Circuit") for the reasons addressed in the attached Rule 28(j), FRAP, letters to the Third Circuit:<sup>5</sup>

- January 26, 2004 – Media Access Project/Institute for Public Representation, Georgetown University Law Center

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<sup>1</sup> CBC is the licensee of WRAL-TV, WRAL-DT, WRAZ-TV, WRAZ-DT and WRAL-FM, Raleigh-Durham, North Carolina; WJZY-TV and WJZY-DT, Belmont, North Carolina; WWWB-TV and WWWB-DT, Rock Hill, South Carolina; and WILM-LPTV, Wilmington, North Carolina.

<sup>2</sup> Consolidated Appropriations Act, 2004, Pub.L.No. 108-199, § 629, 118 Stat. 3 (2004) ("Appropriations Act").

<sup>3</sup> *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, and Definition of Radio Markets for Areas Not Located in An Arbitron Survey Area ("Report and Order")*, 18 FCC Rcd 13620 (2003), appeal pending *sub nom.*, *Prometheus Radio Project, et al v. FCC*, Nos. 03-3388 (3d Cir.).

<sup>4</sup> 47 C.F.R. § 73.3555(e).

<sup>5</sup> CBC is an intervener in the pending appeal of the *Report and Order* at the Third Circuit. Media Access Project is counsel to petitioners, Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, and National Council of the Churches of Christ in the United States. The Institute for Public Representation, Georgetown University Law Center, is counsel to petitioner, Media Alliance.

- February 2, 2004 – CBC
- March 3, 2004 – CBC
- March 5, 2004 – Media Access Project/Institute for Public Representation,  
Georgetown University Law Center

Respectfully submitted,

**CAPITOL BROADCASTING COMPANY, INC.**

By: /s/ Dianne Smith  
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March 19, 2004

Appendix A  
Rule 28(j), FRAP Letters  
United States Court of Appeals  
For the Third Circuit

*Prometheus Radio Project, et al. v. FCC, et al.*

- January 26, 2004 – Media Access Project/Institute for Public Representation,  
Georgetown University Law Center
- February 2, 2004 – CBC
- March 3, 2004 – CBC
- March 5, 2004 – Media Access Project/Institute for Public Representation,  
Georgetown University Law Center

January 26, 2004



Marcia M. Waldron  
Clerk, United States Court of Appeals for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

RE: *Prometheus Radio Project, et al. v. FCC and United States*  
No. 03-3388

Dear Ms. Waldron:

This letter is submitted pursuant to Rule 28(j), FRAP.

The Consolidated Appropriations Act of 2004 was enacted on January 22, 2004, and will imminently become law. Section 629 (Attachment A) establishes a 39% television audience reach cap and provides for quadriennial review of other ownership rules. Therefore, appeals of the FCC's decision adopting a 45% cap may become moot.

This legislation does not moot anti-deregulatory petitioners and intervenors' challenges to the FCC's retention of the UHF Discount. Indeed, Section 629 does not even mention the Discount. Univision/Paxson suggest (at n.3 of their reply brief) that language added to Section 202(h) exempting from quadrennial review "any rules relating to" the 39 percent national audience reach limitation somehow prohibits the FCC from modifying the UHF Discount. This is clearly wrong. As amended, Section 202(h) (Attachment B) would, at most, preclude the FCC from considering the UHF Discount in future quadrennial review proceedings. It surely would not stop the FCC from modifying the UHF Discount using ordinary APA powers.

Since Section 202(h) as amended does not mention the UHF Discount, treating the legislation as freezing the UHF Discount would be illogical. "National audience reach," the measure used to calculate the 39% cap, *see* 47 CFR §73.3555(d)(2)(i) (2003), cannot be static, as it relies not only on the UHF Discount, but also on proprietary Nielsen DMA market definitions which are revised from time to time. Because Nielsen could go out of business, stop issuing DMA data, or come to be regarded as unreliable, it is inconceivable that Congress would prohibit the FCC from modifying Section (d)(2)(i).

The appropriations amendment was adopted because of widespread Congressional concern over the excessively deregulatory nature of the FCC's action. Thus, the 39% cap precludes further consolidation, and the quadrennial review significantly slows the pace of FCC deregulatory efforts. It is implausible that Congress would simultaneously freeze the UHF Discount, since that would promote consolidation and preclude further tightening of the UHF Discount.

The UHF Discount is ripe for review and this Court can and should decide the issue.

Respectfully submitted,

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and Accuracy in Reporting, Center for Digital  
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# ATTACHMENT A

administer Small Business Administration programs in Alaska, Hawaii, and the territories, including disaster loans to fishermen, programs benefitting Alaska Native Corporations and Native Hawaiians, including but not limited to section 8(a) and Historically Underutilized Business Zones, and all other programs serving Alaska Natives and Native Hawaiians. All disaster loans issued in Alaska shall be administered by the Small Business Administration and shall not be sold during fiscal year 2004.

SEC. 625. None of the funds made available in this Act may be transferred to any department, agency, or instrumentality of the United States Government, except pursuant to a transfer made by, or transfer authority provided in, this Act or any other appropriation Act.

SEC. 626. The Secretary of Commerce shall negotiate or reevaluate, with the consent of the President, international agreements affecting international ocean policy.

SEC. 627. The Departments of Commerce, Justice, State, the Judiciary, and the Small Business Administration shall each establish a policy under which eligible employees may participate in telecommuting to the maximum extent possible without diminished employee performance: *Provided*, That, not later than 6 months after the date of the enactment of this Act, each of the aforementioned entities shall provide that the requirements of this section are applied to 100 percent of the workforce: *Provided further*, That, of the funds appropriated in this Act for the Departments of Commerce, Justice, and State, the Judiciary, and the Small Business Administration, \$200,000 shall be available to each Department or agency only to implement telecommuting programs: *Provided further*, That, every 6 months, each Department or agency shall provide a report to the Committees on Appropriations on the status of telecommuting programs, including the number of Federal employees eligible for, and participating in, such programs, and uses of funds designated under this section: *Provided further*, That each Department or agency shall designate a “Telework Coordinator” to be responsible for overseeing the implementation of telecommuting programs and serve as a point of contact on such programs for the Committees on Appropriations.

SEC. 628. The paragraph under the heading “Small Business Administration—Disaster Loans Program Account” in chapter 2 of division B of Public Law 107–117 is amended by inserting “or section 7(b) of the Small Business Act” after “September 11, 2001”.

SEC. 629. The Telecommunications Act of 1996 is amended as follows—

(1) in section 202(c)(1)(B) by striking “35 percent” and inserting “39 percent”;

(2) in section 202(c) by adding the following new paragraphs at the end:

“(3) DIVESTITURE.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.



“(4) FORBEARANCE.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);” and

(3) in section 202(h) by striking “biennially” and inserting “quadrennially” and by adding the following new flush sentence at the end:

“This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).”.

SEC. 630. (a) Tracing studies conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives are released without adequate disclaimers regarding the limitations of the data.

(b) The Bureau of Alcohol, Tobacco, Firearms, and Explosives shall include in all such data releases, language similar to the following that would make clear that trace data cannot be used to draw broad conclusions about firearms-related crime:

(1) Firearm traces are designed to assist law enforcement authorities in conducting investigations by tracking the sale and possession of specific firearms. Law enforcement agencies may request firearms traces for any reason, and those reasons are not necessarily reported to the Federal Government. Not all firearms used in crime are traced and not all firearms traced are used in crime.

(2) Firearms selected for tracing are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. Firearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.

SEC. 631. Section 503(f) of the Small Business Investment Act of 1958 (15 U.S.C. 697(f)) shall be amended by substituting “March 15, 2004” for the last date that appears in the subsection.

SEC. 632. In addition to amounts otherwise appropriated in this Act, the unobligated balances previously made available by section 507(g) of Public Law 105–135 shall be available until expended for the cost of general business loans under section 7(a) of the Small Business Act.

SEC. 633. (a) There is established in the Treasury of the United States a trust fund to be known as the International Center for Middle Eastern-Western Dialogue Trust Fund. The income from the fund shall be used for operations of the International Center for Middle Eastern-Western Dialogue to promote dialogue and scholarship in the Middle East. The fund may accept contributions and gifts from public and private sources.

(b) It shall be the duty of the Secretary of the Treasury to invest in full amounts made available to the fund. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. The interest on, and the proceeds from the sale or redemption of, any obligations held in the fund shall be credited to and form a part of the fund and shall remain available without fiscal year limitation.

(c) For each fiscal year, there is authorized to be appropriated from the fund for the operations of the International Center for

# ATTACHMENT B

Provisions of the Telecommunications Act of 1996  
(As Amended by the Consolidated Appropriations Act of 2004)

**Section 202(c)(1)**

(c) TELEVISION OWNERSHIP LIMITATIONS.--

(1) NATIONAL OWNERSHIP LIMITATIONS.-- The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 39 percent.

**Section 202(h)**

(h) FURTHER COMMISSION REVIEW.--The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

## Berger & Montague, P.C.

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February 2, 2004

Marcia M. Waldron  
Clerk  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
2100 United States Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

**Re: *Prometheus Radio Project v. FCC*  
Nos. 03-3388 *et al.***

Dear Ms. Waldron:

Capitol Broadcasting Company, Inc., submits this letter-brief pursuant to the directive of the Clerk by letter of January 27, 2004.

As the Federal Communications Commission effectively acknowledges in its submission, the Consolidated Appropriations Act has no impact on the challenge in this proceeding to the Commission's failure to properly reconsider the UHF Discount. That this is so is apparent from several different facts.

First, the legislation itself takes no action relating to the Discount. It does not raise it, lower it, direct that it remain the same, or direct the FCC to do or consider doing any of these things or anything else, with respect to the Discount. It is simply silent on the subject.

Second, the only language in the legislation that conceivably bears on the Discount is the directive in Section 202(h) of the legislation relating to the Commission's conduct of its periodic

reviews . Even assuming that this provision sweeps up the Discount in its reach, it relates only to the Commission's obligation going forward to address the Discount issue in the future. It too says nothing about the correctness of the Commission's actions heretofore with respect to the Discount.

Those actions are the ones now on review before this Court, and the legislation does nothing to make it possible for the Commission to escape judicial challenge of its now-completed actions. The Commission has done what it has done, and those actions are now subject to judicial challenge as arbitrary and capricious. Nothing in the legislation supercedes those actions or makes the judicial challenges in any way less pressing.

In contravention of the Court's directive of January 27, 2004, directing the parties to address the impact of the new legislation on this appeal, the Commission has addressed another issue, entirely unrelated to the new statute. The Commission's January 30, 2004, letter brief to the Court addresses Capitol Broadcasting's attack on the UHF Discount, notwithstanding the fact that the Commission itself makes no attempt to argue that the new legislation has any impact at all on the propriety of the Court's addressing the Discount at this time.

Instead, the Commission points to Capitol's Petition for Reconsideration, pending before the agency, and repeats its already-briefed request that this Court decline to address the merits of

the UHF Discount. The Commission's effort is not only inappropriate given the confines of the Court's January 27 directive: it is also wrong on the merits.

First, as Capitol explained in its Reply Brief, at 13, the UHF Discount is appropriately before this Court because the Discount was effectively raised by petitioner Prometheus. Capitol showed in its Reply Brief, at 14, that in September of 2003, when the Motion for Stay was argued, Petitioner Prometheus stated that the UHF Discount would be an important element of the challenges presented to the Commission's Order. And indeed, following this Court's directive that petitioners and intervenors who are substantively aligned should divide the issues they wished to address among their respective briefs, and should avoid repetition, Capitol briefed this issue, and Prometheus relied upon and adopted Capitol's argument on the Discount. This Prometheus itself made clear in its own Reply Brief. See *id.* at 47. There is thus no room for the Commission's argument that the propriety of the Commission's actions with respect to the UHF Discount is not properly before this Court.

The Commission's next argument – that even if the Court has jurisdiction it should defer the issue until the agency chooses to resolve Capitol's Reconsideration Petition – is also wrongheaded, particularly in light of the position the Commission has previously taken in this case with respect to abeyance.

Marcia M. Waldron, Clerk  
February 2, 2004  
Page 4

As noted at page 5 of the Joint Reply Brief of Prometheus Radio, et al., in Support of Motion for Stay Pending Judicial Review ("Joint Reply"), it is the Commission's normal practice to file a motion asking a court reviewing one of the agency's orders to hold the judicial appeal in abeyance pending the Commission's action on petitions for reconsideration. When such a request is made courts typically grant it. See *ibid.*, at n. 5, and authority cited there.

In this case the Commission chose not to file such a motion, notwithstanding its clear awareness that Petitions for Reconsideration were pending - including Capitol's, which addresses the UHF Discount – and notwithstanding the Commission's awareness that the Discount would be a central issue on this appeal.

Now, after the parties have fully briefed the issues, including that one, the Commission has in effect retroactively decided to go back and ask that certain parts of the appeal be held in abeyance. Coming two weeks before oral argument, and after all issues have been briefed at great length by numerous parties and intervenors, the effort comes far too late.

Capitol also notes that holding this issue in abeyance for however long the Commission chooses to take to resolve the Reconsideration Petition will also create a substantial risk of irreparable harm. As explained in the Joint Reply, *supra*, at 2, while the Petition for Reconsideration is pending the Commission will approve mergers consistent with its newly

Marcia M. Waldron, Clerk  
February 2, 2004  
Page 5

issued rules. If this Court ultimately strikes down those regulations, the Commission will be faced with the choice between leaving these mergers in place when they violate the correct interpretation the statutes, or attempting to unscramble eggs that should never have been scrambled in the first place. That, indeed, was one of the justifications for this Court's earlier decision to stay the effect of the Commission's Decision. The Commission's request that Capitol's appeal be held in abeyance is nothing more than an effort to persuade the Court to selectively reverse itself on the Stay.

That issue has been litigated and resolved, and Capitol submits that no reason has been proffered justifying the Court's reversing itself as the Commission requests.

Respectfully submitted,

Jerome M. Marcus  
Counsel for Capitol Broadcasting Company, Inc.

cc: All Counsel



**Berger&Montague,P.C.**  
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March 3, 2004

Clerk  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
Room 21400  
United States Courthouse  
601 Market Street  
Philadelphia, PA 19106

**Re: *Prometheus Radio Project, et al., v. FCC & USA*, No. 03-3388  
And consolidated cases (argued February 11, 2004)**

Capitol Broadcasting Company, Inc., submits this letter pursuant to FRAP 28(j).

1. In a February 23, press release (Exhibit A hereto), Commissioners Copps and Adelstein question "the timing" of the FCC staff's solicitation of comments on whether the change in the National Cap affects the UHF Discount. They note that this action "com[es] little more than a week after the oral argument in this case coupled with an immediate communication [to this Court] from the FCC based on the staff Public Notice." They also suggest that coordination of the staff notice and the Commission's 28(j) submission to this Court show the Commission staff's actions may be "an attempt to avoid a substantive court decision on an apparent weakness and inconsistency in the June 2nd media ownership order."

The Commission's repeated "suggestions" regarding abeyance amount to a request for a sentence to purgatory. See, e.g., *Southwestern Bell v. FCC*, 168 F.3d 1344 (D.C. Cir. 1999)(four years' abeyance). Mandamus, while theoretically available after prolonged inaction, is by definition "extraordinary" relief, not a normal remedy for delay. Moreover, the Commission does not argue that abeyance is legally required. Surely there is no reason for this Court to exercise its discretion to condemn the public to an indefinite period of uncertainty about the Discount.

2. Since virtually every issue presented to the Court has been addressed in pending petitions for reconsideration, the only reason to single out the UHF discount is the possible impact of new legislation. But the FCC ignores the fact that the plain language of Section 202(c) addresses only the national cap itself, while 202(h) addresses only procedural timing going forward. The

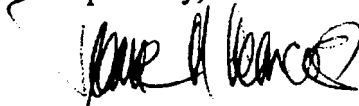
**Berger & Montague, P.C.**  
ATTORNEYS AT LAW

Court Clerk, United States Court of Appeals  
for the Third Circuit  
March 3, 2004

substantive intent of the current Congress regarding the Discount is evidenced by the fact that the Senate Commerce Committee has favorably reported out a bill which would completely eliminate the UHF Discount altogether. See S. 1264 (Exhibit B hereto) at §12.

3. Commissioners Copps and Adelstein also agree the Discount's rationale is "weak[]" and "outdated," persisting "notwithstanding that the majority of consumers receive identical UHF and VHF signals over cable or satellite facilities."

Respectfully,



Jerome M. Marcus

JMM/md  
Enclosures

cc: All Counsel per service list



# NEWS

Federal Communications Commission  
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News Media Information 202 / 418-0500  
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TTY: 1-888-835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.  
See MCI v. FCC, 515 F.2d 585 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE  
February 23, 2004

NEWS MEDIA CONTACTS:  
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## FCC COMMISSIONERS COPPS AND ADELSTEIN REACT TO BUREAU PUBLIC NOTICE ON MEDIA OWNERSHIP RULE

Washington, DC – On February 19, 2004, the Media Bureau issued a Public Notice seeking comment on one part of the Commission's June 2<sup>nd</sup> media ownership decision. In particular, the Bureau Notice seeks comment on the impact on the so-called "UHF Discount" of recent legislation on the national television ownership cap. Under the outdated UHF Discount policy, UHF stations are considered to reach only 50 percent of the households that a VHF station reaches, notwithstanding that the majority of consumers receive identical UHF and VHF signals over cable or satellite facilities.

Commissioners Michael J. Copps and Jonathan S. Adelstein reacted to the Public Notice: "We were surprised to learn last Friday that agency staff had released a Public Notice seeking comment on the UHF Discount. With an issue of this import, it appears to us to be a highly unusual and irregular step for the staff to take without input from members of the Commission. The timing of this move -- coming little more than a week after the oral argument in this case coupled with an immediate communication from the FCC General Counsel to the Third Circuit seeking to hold the issue in abeyance based on the staff Public Notice -- may lead to questions of whether this is an attempt to avoid a substantive court decision on an apparent weakness and inconsistency in the June 2nd media ownership order."

- FCC -

S 1264 RS

**Calendar No. 268**

**108th CONGRESS**

**1st Session**

**S. 1264**

**[Report No. 108-140]**

To reauthorize the Federal Communications Commission, and for other purposes.

**IN THE SENATE OF THE UNITED STATES**

**June 13, 2003**

Mr. MCCAIN (for himself and Mr. HOLLINGS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

**September 3, 2003**

Reported by Mr. MCCAIN, with amendments

**[Omit the part struck through and insert the part printed in italic]**

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**A BILL**

To reauthorize the Federal Communications Commission, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; AMENDMENT OF COMMUNICATIONS ACT OF 1934.**

(a) SHORT TITLE- This Act may be cited as the 'FCC Reauthorization Act of 2003'.

(b) AMENDMENT OF COMMUNICATIONS ACT- Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision of law, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

**SEC. 2. AUTHORIZATION OF APPROPRIATIONS.**

(a) IN GENERAL- Section 6 (47 U.S.C. 156) is amended--

- (1) by striking subsections (a), (b), and (c);
- (2) by redesignating subsection (d) as subsection (c);
- (3) by inserting 'REGULATORY FEES OFFSET-' before 'Of' in subsection (c), as redesignated; and
- (4) by inserting before subsection (c), as redesignated, the following:

'(a) IN GENERAL- There are authorized to be appropriated for the administration of this Act by the Commission \$281,289,000 for fiscal year 2004, \$299,500,000 for fiscal year 2005, \$318,982,000 for fiscal year 2006, and \$334,931,000 [Struck out->] for fiscal year 2007, [~~Struck out~~] *for each of fiscal years 2007 and 2008*, to carry out this Act including amounts necessary for unreimbursed travel, together with such sums as may be necessary for increases resulting from adjustments in salary, pay, retirement, other employee benefits required by law, and other nondiscretionary costs, for each of such years.

'(b) STAFFING LEVELS- The Commission may hire and maintain an adequate number of full time equivalent staff, to the extent of the amounts authorized by subsection (a), necessary to carry out the Commission's powers and duties under this Act.'

(b) DEPOSIT OF APPLICATION FEES- Section 8(e) is amended to read as follows:

'(e) DEPOSIT OF COLLECTIONS- Moneys received from fees established under this section shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the functions of the Commission.'

### **SEC. 3. AUDITS AND [Struck out->] INVESTIGATIONS [~~Struck out~~] REVIEW OF E-RATE BENEFICIARY COMPLIANCE WITH PROGRAM REQUIREMENTS.**

(a) IN GENERAL- The Federal Communications Commission shall conduct [Struck out->] an investigation [~~Struck out~~] *a review* into the implementation, utilization, and Commission oversight of activities authorized by section 254(h) of the Communications Act of 1934 (47 U.S.C. 254(h)) and the operations of the National Education Technology Funding Corporation established by section 708 of the Telecommunications Act of 1996 for each of fiscal years 2004 through 2007, with a particular emphasis on [Struck out->] determining the specific fraud or abuse of Federal funds that has occurred in connection with such activities or operations. [~~Struck out~~] *determining whether any fraud or abuse of Federal funds has occurred in connection with such activities or operations.*

(b) REPORTS- The Commission shall transmit a report, setting forth its finding, conclusions, and recommendations, of the results of its investigation for each of fiscal years 2004 through 2007 to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce within 1 year after the date of enactment of this Act.

(c) FUNDING- Of the amounts authorized by section 6(a) of the Communications Act of 1934 (47 U.S.C. 156(a)), the Commission shall allocate such sums as may be necessary for fiscal years 2004 through 2007 to be used for audits and [Struck out->] investigations [~~Struck out~~] *reviews* of compliance by beneficiaries with the rules and regulations of the Universal Service

Fund program under section 254(h), commonly known as the 'e-rate program'.

#### **SEC. 4. CLARIFICATION OF CONGRESSIONAL INTENT WITH RESPECT TO BIENNIAL REVIEW MODIFICATIONS; FREQUENCY OF REVIEW.**

(a) COMMISSION REVIEW OF OWNERSHIP RULES- Section 202(h) of the Telecommunications Act of 1996 is amended to read as follows:

'(h) Further Commission Review-

'(1) IN GENERAL- The Commission shall review its rules adopted pursuant to this section, and all of its ownership rules [~~Struck out->~~] quinquennially [~~<-Struck out~~] *quadrennially* (beginning with 2007), and shall determine whether--

'(A) any rule requires strengthening or broadening;

'(B) any rule requires limiting or narrowing;

'(C) any rule should be repealed; or

'(D) any rule should be retained.

'(2) CHANGE, REPEAL, OR RETAIN- The Commission shall change, repeal, or retain such rules pursuant to its review under paragraph (1) as it determines to be in the public interest.'

(b) OTHER REGULATORY REFORM REVIEWS- Section 11 of the Communications Act of 1934 (47 U.S.C. 161) is amended by adding at the end the following:

'(c) OWNERSHIP RULES- Subsections (a) and (b) do not apply to ownership rules reviewable under section 202(h) of the Telecommunications Act of 1996.'

#### **SEC. 5. FCC ENFORCEMENT ENHANCEMENTS.**

(a) FORFEITURES IN CASES OF REBATES AND OFFSETS-

(1) BROADCAST AND MULTICHANNEL VIDEO PROVIDERS- Section 503(b)(2)(A) (47 U.S.C. 503(b)(2)(A)) is amended--

(A) by striking 'operator, or' in clause (i) and inserting 'operator or any other multichannel video distributor, or';

(B) by striking '\$25,000' and inserting '\$250,000'; and

(C) by striking '\$250,000' and inserting '\$2,500,000'.

(2) COMMON CARRIERS- Section 503(b)(2)(B) (47 U.S.C. 503(b)(2)(B)) is amended--

(A) by striking '\$100,000' and inserting '\$1,000,000'; and

(B) by striking '\$1,000,000' and inserting '\$10,000,000'.

(3) OTHERS- Section 503(b)(2)(C) (47 U.S.C. 503(b)(2)(C)) is amended--

(A) by striking '\$10,000' and inserting '\$100,000'; and

(B) by striking '\$75,000' and inserting '\$750,000'.

(4) STATUTE OF LIMITATIONS- Section 503(b)(6) (47 U.S.C. 503(b)(6)) is amended--

(A) by striking '1 year' in subparagraph (A)(i) and inserting '2 years'; and

(B) by striking '1 year' in subparagraph (B) and inserting '2 years'.

(b) FORFEITURES OF COMMUNICATIONS DEVICES- Section 510 (47 U.S.C. 510) is amended by inserting 'and any equipment used to create malicious interference in violation of section 333,' after '302,'.

[Struck out->] (c) LIABILITY OF CARRIERS FOR DAMAGES- Section 206 (47 U.S.C. 206) is amended to read as follows: [<-Struck out]

[Struck out->] **SEC. 206. LIABILITY OF CARRIERS FOR DAMAGES.** [<-Struck out]

[Struck out->] 'A common carrier that does, or causes or permits to be done, any act, matter, or thing prohibited or declared to be unlawful in this Act, or in any rule, regulation, or order issued by the Commission, or that fails to do any act, matter, or thing required to be done by this Act, or by any rule, regulation, or order of the Commission is liable to any person injured by such act or failure for the full amount of damages sustained in consequence of such act or failure, together with a reasonable attorney's fee. The amount of the attorney's fee shall be-- [<-Struck out]

[Struck out->] '(1) fixed by the court in every case of recovery in a judicial proceeding; or [<-Struck out]

[Struck out->] '(2) fixed by the Commission in every case of recovery in a Commission proceeding.' [<-Struck out]

[Struck out->] (d) VIOLATIONS OF REGULATIONS, RULES, AND ORDERS- Section 208 (47 U.S.C. 208) is amended by inserting 'or of any rule, regulation, or order of the Commission,' after 'thereof,'. [<-Struck out]

## **SEC. 6. APPLICATION OF COMMUNICATIONS ACT WITH BANKRUPTCY AND SIMILAR LAWS.**

(a) IN GENERAL- Section 4 (47 U.S.C. 154) is amended by adding at the end the following:

'(p) Application With Bankruptcy Laws-

'(1) IN GENERAL- The bankruptcy laws shall not be applied--

`(A) to avoid, discharge, stay, or set-off any pre-petition debt obligation to the United States arising from an auction under this Act,

`(B) to stay the payment obligations of the debtor to the United States if such payments were a condition of the grant or retention of a license under this Act, or

`(C) to prevent the automatic cancellation of licenses for failure to comply with any monetary or non-monetary condition for holding any license issued by the Commission, including automatic cancellation of licenses for failure to pay a monetary obligation of the debtor to the United States when due under an installment payment plan arising from an auction under this Act,

except that, upon cancellation of a license issued by the Commission, the United States shall have an allowed unsecured claim for any outstanding debt to the United States with respect to such canceled licenses, and that unsecured debt may be recovered by the United States under its rights as a creditor under title 11, United States Code, or other applicable law.

`(2) DEBTOR TO HAVE NO INTEREST IN PROCEEDS OF AUCTION- A debtor in a proceeding under the bankruptcy laws shall have no right or interest in any portion of the proceeds from an auction of any license reclaimed by the Commission for failure to pay a monetary obligation of the debtor to the United States in connection with the grant or retention of a license under this Act.

`(3) SECURITY INTERESTS- Notwithstanding any other provision of law, the Commission may--

`(A) establish rules and procedures governing security interests in licenses, or the proceeds of the sale of licenses, issued by the Commission; and

`(B) establish an office within the Office of Secretary for the recording and perfection of such security interests without regard to otherwise applicable State law.

`(4) BANKRUPTCY LAWS DEFINED- In this subsection, the term 'bankruptcy laws' means title 11, United States Code, or any otherwise applicable Federal or State law regarding insolvencies or receiverships, including any Federal law enacted or amended after the date of enactment of the FCC Reauthorization Act of 2003 not expressly in derogation of this subsection.'

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall [Struck out->] apply to cases and proceedings commenced on or after the date of enactment of this Act. [~~Struck out~~] *not apply to cases in bankruptcy if the petition for bankruptcy was filed on or before June 26, 2003.*

## SEC. 7. BAN ON REIMBURSED TRAVEL EXPENSES.

Section 4(g)(2) (47 U.S.C. 154(g)(2)) is amended to read as follows:

`(2) Notwithstanding section 1353 of title 31, United States Code, section 4111 of title 5, United States Code, or any other provision of law in pari materia, no Commissioner or employee of the Commission may accept, nor may the Commission accept, payment or reimbursement from the



nongovernmental sponsor (or any affiliated organization) of any convention, conference, or meeting for expenses for travel, subsistence, or related expenses incurred by a commissioner or employee of the Commission for the purpose of enabling that commissioner or employee to attend and participate in any such convention, conference, or meeting. The Commission may establish a de minimus level of payment or value to which the preceding sentence does not apply.'

## **SEC. 8. APPLICATION OF ONE-YEAR RESTRICTIONS TO CERTAIN POSITIONS.**

For purposes of section 207 of title 18, United States Code, an individual serving in any of the following ~~[Struck out-]~~ positions ~~[<-Struck out]~~ *positions, or in any successor position*, at the Federal Communications Commission is deemed to be a person described in section 207(c)(2)(A)(ii) of that title, regardless of the individual's rate of basic pay:-

- (1) Chief, Office of Engineering and Technology.
- (2) Director, Office of Legislative Affairs.
- (3) Inspector General, Office of Inspector General.
- (4) Managing Director, Office of Managing Director.
- (5) General Counsel, Office of General Counsel.
- (6) Chief, Office of Strategic Planning and Policy Analysis.
- (7) Chief, Consumer and Governmental Affairs Bureau.
- (8) Chief, Enforcement Bureau.
- (9) Chief, International Bureau.
- (10) Chief, Media Bureau.
- (11) Chief, Wireline Competition Bureau.
- (12) Chief, Wireless Telecommunications Bureau.
- (13) *Any position for which the individual was appointed under section 4(f)(2) of the Communications Act of 1934 (47 U.S.C. 4(f)(2)).*

## **SEC. 9. VIDEO DESCRIPTION RULES AUTHORITY.**

(a) **IN GENERAL-** Notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in *Motion Picture Association of America, Inc., et al., v. Federal Communications Commission, et al.* (309 F. 3d 796, November 8, 2002), the Federal Communications Commission--

- (1) shall, within 90 days after the date of enactment of this Act, reinstate its video

description rules contained in the report and order identified as Implementation of Video Description of Video Programming, Report and Order, 15 F.C.C.R. 15,230 (2000); [Struck out->] and [<-Struck out]

(2) may amend, repeal, or otherwise modify such [Struck out->] rules. [<-Struck out] rules; and

(3) shall initiate a proceeding within 180 days after the date of enactment of this Act to consider whether it is economically and technically feasible and consistent with the public interest to include 'accessible information' in its video description rules.

*(b) ACCESSIBLE INFORMATION DEFINED- In this section, the term 'accessible information' may include written information displayed on television screens during regular programming, hazardous warnings and other emergency information, local and national news bulletins, and any other information the Commission deems appropriate.*

## **SEC. 10. POLITICAL BROADCASTING REGULATIONS REVIEW.**

*(a) IN GENERAL- By no later than August 1, 2004, the Federal Communications Commission shall complete rulemakings to--*

*(1) provide specific guidance to affected parties concerning what the Commission will consider to constitute an exercise of reasonable diligence in compliance with its regulations set forth at 47 C.F.R. 73.1212(b) and 47 C.F.R. 1615(b) with respect to political matter and issue advertising described in its regulations set forth at 47 C.F.R. 73.1212(d) and (e) (with respect to broadcast stations) and at 47 C.F.R. 76.1615(c) and (d) (with respect to cable television system operators); and*

*(2) establish procedures for the prompt filing, consideration, and resolution of complaints pertaining to violations of its regulations concerning political matter and issue advertising, and of appeals therefrom, including the following regulations pertaining to such advertising:*

*(A) Sponsorship identification (47 C.F.R. 73.1212(a) through (e)).*

*(B) Legally qualified candidates for public office (47 C.F.R. 73.1940).*

*(C) Equal opportunities (47 C.F.R. 73.1941).*

*(D) Candidate rates (47 C.F.R. 73.1942).*

*(E) Political file (47 C.F.R. 73.1943).*

*(F) Reasonable access (47 C.F.R. 73.1944).*

*(G) Origination cablecasts by legally qualified candidates for public office and equal opportunities (47 C.F.R. 76.205).*

*(H) Candidate rates (47 C.F.R. 76.206).*

*(I) Sponsorship identification (47 C.F.R. 76.1615).*

*(J) Political file (47 C.F.R. 76.1701).*

*(K) Public interest obligations (47 C.F.R. 25.701(b)).*

## **SEC. 11. SPECIAL RULES FOR INDECENT BROADCASTING.**

*Section 503 of the Communications Act of 1934 (47 U.S.C. 503) is amended by adding at the end the following:*

*“(c) Special Rules for Broadcasting Obscene or Indecent Matter-*

*“(1) MULTIPLE VIOLATIONS- If the violation of section 1464 of title 18, United States Code, involves the broadcast of obscene or indecent matter from more than 1 individual during the same program, then the broadcast of such matter from each individual shall be considered a separate violation.*

*“(2) REVOCATION PROCEEDING TO BE COMMENCED- If the Commission has reason to believe that an entity described in subsection (b)(2)(A)(i) of this section has violated section 1464 of title 18, United States Code, then the Commission shall commence a proceeding under section 312(a)(6) to revoke the station license or construction permit of that entity and shall revoke such station license or construction permit unless the Commission determines that such action would not be in the public interest.”*

.AEMD23AFAEMD23AF

## **SEC. 12. PHASE-OUT OF UHF DISCOUNT.**

*(a) IN GENERAL- No Discount for Newly Acquired Stations- The attribution discount permitted for UHF television stations pursuant to section 73.5555(e)(2) of the Federal Communication Commission's regulations (47 C.F.R. 73.5555(e)(2)) shall not apply to any UHF station granted, transferred, or assigned after June 2, 2003, for the purpose of calculating the aggregate national audience reach of a party under section 73.3555(e)(1) of those regulations (47 C.F.R. 73.3555(e)(1)).*

*(b) SUNSET OF UHF DISCOUNT FOR EXISTING STATIONS- Beginning on January 1, 2008, the attribution discount permitted for UHF television stations pursuant to section 73.5555(e)(2) of the Federal Communication's regulations (47 C.F.R. 73.5555(e)(2)) shall expire.*

## **SEC. 13. DIGITAL TRANSLATORS.**

*Section 336(f)(4) of the Communications Act of 1934 (47 U.S.C. 336(f)(4)) is amended by adding at the end “Within 60 days after the date of enactment of the FCC Reauthorization Act of 2003, the Commission shall initiate a rulemaking implementing this section to authorize the operation of digital television translators and digital on-channel repeaters.”..AEMD23AFAEMD23AF*

Calendar No. 268

108th CONGRESS

1st Session

**S. 1264**

**[Report No. 108-140]**

**A BILL**

To reauthorize the Federal Communications Commission, and for other purposes.

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**September 3, 2003**

**Reported with amendments**

*END*

March 5, 2004



Ms. Marcia M. Waldron  
Clerk  
U.S. Court of Appeals for the Third Circuit  
21400 U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

Re: *Prometheus Radio Project, et al. v. FCC and U.S.A.*, Docket No. 03-3388  
(argued Feb. 11, 2004).

Dear Ms. Waldron:

FCC's failure to file an abeyance motion gives opponents only 350 words to respond to the February 20 letter "suggest[ing]" that the UHF discount issue be held in abeyance.

Citizen Petitioners observe that Commissioners, not staff, customarily solicit comment on matters before them. Moreover, Commissioners are typically consulted about staff solicitations, leading two Commissioners to suggest that the notice was motivated by litigation tactics. Since the issue is one which could be resolved by interpretive ruling without notice and comment, *see, e.g., Appalachian States Low-Level Radioactive Waste Commission v. O'Leary*, 93 F.3d 103 (3d Cir. 1996), and given the FCC's disinterest in seeking comments on the Diversity Index, the solicitation is, at the least, suspicious.

The plain language of amended Section 202(c) is dispositive as to mootness of the UHF discount issue. As such, it is a *Chevron* Step-1 question. Agencies' interpretation of such questions are not accorded special deference; rather, they are reviewed *de novo*. Thus, there is little benefit to be derived from awaiting for the FCC to construe Section 202(c). This must be balanced against the delay and uncertainty of abeyance. (Given the delay which would be engendered, and the straightforwardness of the issue, abeyance would still be inappropriate even if this fell under Step-2.)

At oral argument, Judge Ambro asked whether use of the term "national audience reach" in Section 202(h) somehow freezes the UHF discount. Section 202(h) does not govern the size or characteristics of the cap, only when it is reviewed. Moreover, 47 CFR §73.3555(d)(2)(i) employs proprietary market measures which are inherently volatile, and cannot be frozen by Congress or any federal authority. Indeed, *after* Congress set the cap at 35% in 1996, the FCC amended the rule to use Nielsen rather than Arbitron market data. *Broadcast Television National Rules*, 15 FCCRcd 20743, 20752-53 (1999). In light of this history, Congress would have had to give a "strong affirmative indication" of any intent to freeze the discount in 2004. *See AFL-CIO v. Brock*, 835 F.2d 912, 916 (D.C. Cir. 1987).

Sincerely,

Andrew Jay Schwartzman  
Counsel for Citizen Petitioners

cc. Counsel (listed on attached service list)